Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/13738/2015**

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U/13747/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 05 September 2017	**On 18 September 2017**

Before

THE HON. MR JUSTICE MCCLOSKEY, PRESIDENT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

HVT AND ET
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Ms A Holmes, Senior Home Office Presenting Officer
For the Respondents: Ms J Norman, of counsel, instructed by Stevens Machi Solicitors

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION

1. The underlying judicial decision is that of the First-tier Tribunal ("FtT") promulgated on 21 November 2016. By this decision the FtT allowed the Appellants' appeals on human rights grounds.

2. The decision which was thereby successfully challenged was one of the Secretary of State dated 02 December 2015 whereby the application of HVT for leave to remain invoking Article 8 of the Human Rights Convention was refused. As the decision of the FtT makes clear this refusal decision had direct consequences for other family members.

3. The Secretary of State sought permission to appeal to this Tribunal. In the application for permission the first ground contended that the FtT had erred in law in its handling of the interplay between Section 117B(6) of the 2002 Act and its application of the best interests principle. In summary the contention advanced was that the approach of the FtT failed to consider all relevant factors in the round.

4. The second ground of appeal specifically refers to paragraphs 35 and 41 of the decision of the FtT. The complaint in this ground is that the Tribunal failed to provide adequate reasons for its proportionality assessment. The third ground of appeal is somewhat opaque, has not featured in argument and I shall say nothing about it.

5. The grant of permission to appeal deals mainly with the issue of whether the permission application was in time. As regards the permission application itself the order of the permission judge is expressed in the following cryptic terms:

> *"The grounds are arguable in light of the decision of the European Court of Justice in the case of Chavez-Wilchez"*

This prompts the immediate observation that no part of the permission application relied on that decision or developed any arguments based upon it. As a result there is an obvious and unmistakable mismatch between the grant of permission to appeal and the grounds of appeal.

6. Ms Holmes has correctly acknowledged that the Chavez decision is simply not in point and, as a result, the Secretary of State does not seek to develop any argument based upon it before this Tribunal. Thus the contention raised in the Appellant's Rule 24 response by Ms Norman of counsel is conceded. This contention is that the decision in Chavez-Wilchez is irrelevant as this was a human rights appeal under domestic law and not an EEA appeal.

7. There are three ways in which the order of a permission judge might be approached. The first is to treat the order as ineffective, null and void as it bears no relationship whatsoever, expressed or implied, with the

application for permission to appeal. While I observe that there may be grounds for adopting that course I reserve this interesting issue of procedural law for some future appropriate case as it is unnecessary to decide it in the present case.

8. Turning to the second possible approach, the present case can be determined on the basis that the grant of permission to appeal is formulated in clearly qualified terms. It is properly construed as a ruling that the grounds of appeal are arguable only on the basis of the decision of the European Court of Justice in Chavez-Wilchez. It is now common case that this decision does not sound on any of the issues raised by the Secretary of State. Thus the Secretary of State does not – and cannot – advance this appeal by reference to, and within the compass of, the grounds of appeal.

9. Given this analysis, I consider that the appeal must be dismissed. To permit the Secretary of State to advance the appeal on any basis other than the Chavez-Wilchez decision would be misconceived as permission to appeal to that effect has not been granted. It would also be procedurally unfair.

10. The third possible approach to the order of the permission judge is that it was capable of being reconsidered, on application, due to its lack of coherence and intelligibility. While I do not rule definitively that such an application was procedurally possible, it seems likely that it was: see rule 5(1) of the 2008 Rules which, notably, is not modified or emasculated by anything which follows. No such application was made. Or, the purported grant of permission could be treated as a refusal, thereby triggering the renewal mechanism in rule 21(2). Full argument on this interesting procedural issue in an appropriate future case would be welcome.

11. Finally, I should make clear my view that if the permission judge had engaged with the Secretary of State's grounds of appeal, I consider that permission to appeal would (or should) not have resulted. The grounds of appeal were demonstrably frail and did not overcome the applicable threshold.

12. In these circumstances the Secretary of State's appeal to the Upper Tribunal must be dismissed and the decision of the FtT is hereby affirmed.

Signed: Edward McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 05 September 2017